No. 20495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FARMER BROS. CO.,

Appellant,

vs.

HUDDLE ENTERPRISES, INC.,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Nature of Appeal.

This is an appeal by Farmer Bros. Co. from an Order of the United States District Court sustaining the Referee's Findings and Order denying Appellant's application for authority to foreclose its deed of trust, without prejudice to the right of Farmer Bros. Co. to apply for similar relief in the event the situation in the bankruptcy proceedings should materially change, which might jeopardize the security held by Farmer Bros. Co., and further ordering the retention of jurisdiction by the Court for the purpose of passing upon the rights of Farmer Bros. Co. to foreclose should an application be made therefor in the future.

Statement of the Case.

On February 1, 1958, Farmer Bros. Co. received from Paul S. and Ruth Cummins, who were then husband and wife and who were the owners of the

property hereinafter mentioned, a promissory note executed by Paul S. and Ruth Cummins in the principal sum of $200,000.00, and an addition dated June 5, 1958 in the sum of $25,000.00 also executed by Mr. and Mrs. Cummins; each of said notes being secured by deeds of trust dated February 1, 1958 on 18 parcels of real estate. One parcel was situated in Stanislaus County, California; two parcels in Fresno County, California, and the other parcels all located in Los Angeles County. [See Exhibit attached to Application of Farmer Bros. Co.] Upon each of said parcels there was located a service station, which had been leased and was being operated by the Texas Company; the expiration date on all of said leases was September 30, 1970.

Since the execution of said deeds of trust and note, one of the 18 service stations has recently ceased operation due to a condemnation proceeding by the City of Los Angeles upon a portion of said parcel, from which the estate has received a settlement of $28,-100.00. This amount has, since the hearing herein, been received and applied upon the indebtedness due the first lien holder, United California Bank, thereby reducing the bank's secured claim by $28,100.00.

The interest upon the secured indebtedness due Farmer Bros. Co. was paid until June 20, 1960, but since said date, the interest has accrued and the total amount of principal and interest due as of October 1, 1964, was $297,633.83. The monthly interest upon this obligation is $1,036.30.

The above secured indebtedness due Farmer Bros. Co. is subject to a first deed of trust upon the same property, in favor of the United California Bank, to

secure the payment of an indebtedness which was originally in the principal sum of $1,000,000.00 at 4% interest per annum, payable at the rate of $7,400.00 per month, the full amount due and payable on or before September 1, 1970. The monthly payments are being paid from rentals received from the Texas Company. The balance due upon this first trust deed in favor of the bank was the sum of $515,730.41 on October 13, 1964, before the $28,100.00 received in the condemnation settlement was applied; and, of course, there have been the usual monthly payments since October, 1964.

There is a third trust deed upon this property in the sum of $120,000.00, and there was pending a proceeding before the Referee involving this lien at the time of the hearing herein, but which has since been compromised in a manner which will not involve a foreclosure.

There is a fourth trust deed of about $17,000.00.

Huddle Enterprises of California, which later changed its name to Huddle Enterprises, Inc., was incorporated on February 6, 1959 for the purpose of becoming the assignee of Paul S. and Ruth Cummins. This corporation was organized by the larger creditors of Paul S. and Ruth Cummins, which included Farmer Bros. Co. The first meeting of the organizers and directors was held February 9, 1959, and while no one from Farmer Bros. Co. was present at the meeting, Frank T. Murphy of Farmer Bros. Co. was elected a director. He accepted the office and attended the meeting of the board of directors held on February 26, 1959 at the Mayfair Hotel in Los Angeles, and subsequent meetings.

At the meeting of the board of directors held on February 13, 1959, the assignment for the benefit of creditors executed by Paul S. and Ruth Cummins and their various corporations was accepted by Huddle Enterprises, Inc., and except for the time a trustee in bankruptcy was in possession of the assets, Huddle Enterprises, Inc. has been in possession and control thereof, as assignee of Paul S. and Ruth Cummins. The property of Mr. and Mrs. Cummins not only consisted of service stations and garages, but they operated and subsequently assigned to Huddle Enterprises, Inc., numerous restaurants in and about Los Angeles, California, which may explain why some of the creditors herein named were so interested and so involved in the financial affairs of Paul S. and Ruth Cummins.

Subsequent to the above mentioned meetings of the board of directors of Huddle Enterprises, Inc., there were numerous other such meetings held which were attended by some representative of Farmer Bros. Co., who from the date of the organization of the debtor company, had one of its employees upon the board of directors of debtor.

There was a meeting of the board of directors of Huddle Enterprises, Inc., held at the Carnation Building on February 7, 1961, and Mr. Keefe of Farmer Bros. Co., who was then a director, attended.

Huddle Enterprises, Inc. was, at this time, in serious financial difficulty as the County of Los Angeles had noticed a tax sale for the following day of Huddle's property, and at the last mentioned meeting, there was an extensive discussion of the financial affairs and status of the debtor's estate; of the government liens, both federal and county, and the fact of this imminent

tax sale and also of defaults in rents and of the default on Farmer Bros. Co.'s trust deed.

The writer of this brief was at this meeting, upon request of some of the directors of Huddle Enterprises, Inc., to advise them with reference to questions arising about bankruptcy, including Chapter proceedings.

An involuntary petition in bankruptcy was filed the following morning, and a receiver was appointed in time to stop the tax sale by the county.

After bankruptcy and after adjudication, a creditors' committee was appointed and approved by the Referee. Mr. Keefe of Farmer Bros. Co. was appointed upon this committee, and accepted. He acted in the capacity, not only as a director of the debtor, but also as one of the creditors' committee.

There were many meetings of the creditors' committee held at the Carnation Building and elsewhere, where the terms and conditions of the Plan of Arrangement, as finally approved by the Court, were extensively discussed, formulated, modified and finally approved by the creditors' committee.

The advisability of retaining the service station properties because of the valuable leases thereon was repeatedly mentioned in the discussions of the creditors' committee, and the fact that the bank's loan would soon be reduced to a figure where a new loan could be obtained sufficient to pay all secured creditors, was also discussed. It was often mentioned that in order to retain this property, it would be necessary for the junior lien holders to refrain from foreclosures and to cooperate with the creditors' committee in their effort to work out a successful Plan of Arrangement which

could ultimately benefit unsecured creditors through timely sales of the service station properties.

The representative of Farmer Bros. Co. serving both as a director of the debtor corporation and as a member of the creditors' committee participated in these meetings, and at no time raised any objections to the proposed Plan of Arrangement, stated that Farmer Bros. Co. had cooperated in the past, and he saw no reason why it should not continue to do so.

Farmer Bros. Co. contributed to a fund which was necessary to cover expenses in formulating the Plan of Arrangement.

The Plan of Arrangement, as amended, was approved by the Court on February 18, 1964, and on August 17, 1964, Farmer Bros. Co. filed its Application with the Court for authority to foreclose.

The debtor, in its Answer, alleged and set forth the participation of Farmer Bros. Co. in securing the assignment for the benefit of creditors and the incorporation of Huddle Enterprises, Inc. to act as assignee, as well as its participation in perfecting the Plan of Arrangement.

Debtor also plead estoppel.

The case was tried, and resulted in the Findings of Fact, Conclusions of Law and Order here appealed from.

Evidence.

The summary of the evidence set forth in the Referee's Certificate Upon Review is in as concise form as it could be made and cover the issues. We therefore adopt the Referee's Summary of the Evidence without the necessity of repetition.

We shall review the law of the case, under the evidence, before answering appellant's brief.

Law of the Case.

We have no serious dispute with the contention of Farmer Bros. Co. that in the absence of the consent of a secured creditor or secured creditors, or of acts and conduct amounting to estoppel, the secured claim of such creditor or creditors is not affected by a Plan of Arrangement.

As stated by counsel for Farmer Bros. Co. in their Points and Authorities, the Court may, upon notice and for cause shown, in its discretion enjoin or stay until final decree, any action or the commencement or continuation of any proceeding to enforce any lien upon the property of the debtor. This may be done not only to facilitate the primary purpose of the debtor proceedings, but more often the restraint is granted where there appears to be a clear equity in the property pending the acceptance or rejection of the Plan of Arrangement, for the very good reason that if the Plan fails of approval and adjudication in bankruptcy is ordered, the trustee will then have an opportunity to sell the encumbered property for a price sufficient to pay off the liens and still have a surplus for general unsecured creditors. The court also, at the time of entering the final decree under Section 372, may make such provision ". . . by way of injunction or otherwise, as may be equitable."

of the directors of debtor on some of the government's tax claims was ever present.

Under the above recited facts and under the Findings of the Referee, which were fully warranted by the evidence, Farmer Bros. Co. was estopped from later contending for its right to foreclose.

Huddle Enterprises, Inc. was as much the child of Farmer Bros. Co. as it was of the Carnation Company or Arden Farms Co. All three of these creditors, as well as others, had extended themselves obviously through the coffee and milk business they were getting from the restaurants of Mr. and Mrs. Cummins. They had worked harmoniously with all other creditors in an effort to realize the most out of the business for the benefit of all until after the Carnation Company and Arden Farms Co. together with other creditors, had advanced a very large sum of money to pay certain claims which materially benefited Farmer Bros. Co., and until after the Plan had been approved, and then, Farmer Bros. Co. made its first complaint about the non-payment of its interest and requested permission of the Court to foreclose. By the use of the funds advanced to pay all tax claims, there was no longer a question remaining as to the liability of a director of the debtor corporation to pay such claims.

The acts, conduct and statements of Farmer Bros Co. led both Mr. Baird of the Carnation Company and Mr. Tongue of Arden Farms Co. to believe that Farmer Bros. Co. would cooperate as it had in the past, and would not foreclose; otherwise, neither of these gentlemen would have recommended the advance by each of their companies of the sum of $74,950.00 in order to pay prior tax claims and administration expenses so

that the Plan of Arrangement could be approved. Even as late as the director's meeting of July 16, 1964, after the Plan of Arrangement had been approved, Mr. St. John, in answer to the direct question by Mr. Baird, stated that Farmer Bros. Co. did not intend to foreclose. [See Referee's Certificate Upon Review, p. 23, lines 20-30, p. 119 of Record]. It will be seen from the evidence that the statements made by the various representatives of Farmers Bros. Co. who were on the board of directors of Huddle Enterprises, Inc. and on the creditors' committee from time to time made untrue and misleading statements, which were intended and calculated to mislead and deceive and which did that very thing.

Duty to Speak.

Under such circumstances, where large sums of money were being advanced by the other creditors on the strength of its statements and upon its past and present conduct, Farmer Bros. Co. owed a duty to speak, and to speak frankly and truthfully, especially where it was as much a part of the debtor corporation as was any other creditor—and where its representative held a fiduciary position in the debtor corporation.

> "One who is embarking with others in a common enterprise to use common property for the common benefit, at common expense owes to the others the duty, if he proposes or intends to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it. If he does not, he will be estopped to assert his claim after the others have incurred the expense."
>
> *Verdugo Canon Water Co. v. Verdugo,* 152 Cal. 655 at 682.

An estoppel may arise from silence where there is a duty to speak.

People v. Ocean Shore Railroad, 32 Cal. 2d 406 at 421 No. (19).

Estoppel.

Section 1962(3) of the Code of Civil Procedure of the State of California says:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;"

In defining estoppel *in pais,* 18 Cal. Jur. 2d, page 404 says:

> "Estoppel in pais has been defined as a right arising from an act, admission, or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is asserted. Again, it has been said that estoppel may be defined as a bar by which a person is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that if the truth is established the other will suffer. The doctrine of estoppel in pais is well stated in Code of Civil Procedure §1962 subdivision 3, which embraces in its definition of estoppel all the necessary elements. The section provides that when a party, by his own declaration, act, or omission, has intentionally and deliberately led another to believe a particular thing to be true and to act on such be-

lief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

The Court in commenting upon the provisions of §1962(3) of the Code of Civil Procedure, in the case of *A. Farnell Blair Co. v. Hollywood State Bank,* 102 Cal. App. 2d 418, at 434, says after quoting the above section:

> "An estoppel necessarily results when this factual basis has been established."

The court in *McDaniels v. General Insurance Co.,* 1 Cal. App. 2d 454 at 459, says:

> "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened. (10 Cal. Jur. 645.) The terms 'waiver' and 'estoppel in pais' are sometimes employed indiscriminately; but strictly speaking, the former is used to designate the act or the consequence of the act of one person only, while the latter is applicable where one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts."

In *Dool v. First National Bank of Calexico,* 209 Cal. 717 at 724, the court quotes the language of Subdivision 3, Section 1962, Code of Civil Procedure, in support of its upholding the plea of estoppel and quotes,

with approval from *Parker v. Funk,* 185 Cal. 347 at 352, as follows:

> "The doctrine of estoppel in pais proceeds upon the theory that the party estopped has by his declarations or conduct misled another to his prejudice, so that it would be a fraud upon the latter to allow the true state of facts to be proved." (See *American Nat. Bank v. Sommerville,* 191 Cal. 364, 372 [216 Pac. 376]; *Stanford v. Trombly,* 181 Cal. 372, 378 [186 Pac. 599].)
>
> Or, as again stated: 'If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist.' (21 C.J. 1060, Sec. 2; *Irrigated Valley L. Co. v. Altman,* 57 Cal. App. 413, 428 [207 Pac. 401].)"

See also:

Safeway Steel Products Inc. v. Lefever et al., 117 Cal. App. 2d 489.

In *City of San Diego v. Cuyamaca Water Co.,* 209 Cal. 105 at 137, the court says:

> "The defense of estoppel rests upon the doctrine that a right conceded for the purpose of such defense to exist in a party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable."

The court in *Davenport v. Stratton,* 24 Cal. 2d 232 at 243, defines estoppel as follows:

"Estoppel may be defined to be a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth were established, that other would suffer. (10 Cal. Jur. p. 611.)"

Upon the Theory and Operation of Estoppel.

18 Cal. Jur. 2d, p. 405, §3, says:

"The doctrine of estoppel is based on the theory that the party estopped has by his declarations or conduct misled another to his prejudice, so that it would be a fraud on the latter to allow the true facts to be proved. It is an equitable doctrine that will not be applied against one who is blameless, and rests on the general principle that when one of two innocent persons—that is, persons guiltless of intentional moral wrong—must suffer a loss, it must be borne by the one whose conduct, acts, or omissions rendered the injury possible. The object of the doctrine is protective, and it is limited to saving harmless or making whole the person in whose favor it arises. Its whole office is to protect a person from a loss which, but for the estoppel, he could not escape, and its vital principle is that one who by language or conduct leads another to do what he would not otherwise have done may not subject the other to loss or injury by disappointing the expectations on which he acted.

> Estoppel is applied defensively, and operates to prevent a person from taking unfair advantage of another, not to give an unfair advantage. It is always so applied as to promote the ends of justice, being available only for protection, not as a weapon of assault, and in the nature of things its application depends on the particular facts of each case."

The case of *Collins v. Eksoozian,* 61 Cal. App. 184 at 197, holding the defense of estoppel good against plaintiff seeking the forfeiture under a contract of sale under the doctrine of "when one of two innocent persons, that is, persons each guiltless of intentional moral wrong, must suffer a loss, it must be borne by the one of them who by his conduct, acts, or omissions, has rendered the injury possible."

See also:

Little v. Union Oil Co., 73 Cal. App. 612.

See also the law cited by the Referee in his opinion, to wit, 31 Corpus Juris pages 554 and 559.

In *Langdon v. Langdon,* 47 Cal. App. 2d 28, at 31-32, the court said:

> "The rule applicable is set forth in *Calistoga Nat. Bk. v. Calistoga V. Co.,* 7 Cal. App. 2d 65, 72 [46 Pac. 2d 246]: 'It is a well established rule of law that when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promisor is estopped from taking advantage of the act or omission of the promisee. The violation of such a promise amounts to fraud and estops the promisor from repudiating the agreement on the doctrine

of equitable estoppel.' In *Miles v. Bank of America, etc. Assn.*, 17 Cal. App. 2d 389 [62 Pac. 2d 177], the plaintiff 'was repeatedly assured that if he would be patient and wait, the bank would carry out its agreement.' In holding that the defendant was estopped from setting up the bar of the statute the reviewing court stated: 'Where the delay in commencing action is induced by the conduct of the offending party it cannot be availed of by him as a defense. (*Mitchell v. J. H. Roth & Co.*, 124 Cal. App. 96, 99 [12 Pac. 2d 91].) Nor is it necessary that the promisor shall sign a written agreement to waive the statute of limitations to bar him from subsequently repudiating his agreement. (*Calistoga Nat. Bk. v. Calistoga V. Co.*, supra.) The authorities are uniform to the effect that the conduct of a promisor, or even his silence under certain circumstances, may result in an equitable estoppel. The trial court was justified in holding that the action was not barred."

In the very recent case of *Forman v. Scott,* 231 A.C.A. 377 at 381, the court reaffirms the language in the *Langdon* case, wherein it says:

"It is settled that where the act or promise of one man causes another in reliance thereon to do or forbear to do a thing to his detriment, which he otherwise would have done, the promisor is estopped from taking advantage of the act or omission caused by his own act or promise. (*Langdon v. Langdon* (1941) 47 Cal. App. 2d 28, 31 [117 P. 2d 371]; Calistoga Nat. Bank v. Calistoga Vineyard Co., (1935) 7 Cal. App. 2d 65, 72 [46 P. 2d 246].)"

In the case of *In Re Fleetwood Motel Corporation,* 335 F. 2d 857 at 861-862, the court speaks of the ". . . inherent equity power of the bankruptcy court", and of ". . . the power of a court of equity to refuse enforcement of a forfeiture clause in appropriate circumstances."

The Court's Findings, and more particularly Findings Numbers XVII, XIX, XX, XXI, XXII, XXIII and XXIV are supported by the evidence, and warrant the conclusions of law made by the Court and the Order based thereon.

Farmer Bros. Co. Is Adequately Secured.

The Referee was clearly justified in finding under the evidence that the value upon which Farmer Bros. Co. had its security was of the value of $1,450,000.00.

Mr. Cummins was a competent witness to testify as to the value of the service station properties. He was the owner of these properties. He built the service stations and rented them to Texaco and knew what they had been producing in rentals over the years. He not only was the original owner, but under the Amended Plan of Arrangement, still retains an equitable interest therein. Mr. Cummins' reasoning as to values and the basis for his opinion as to values were sound and well founded. He knew that the City of Los Angeles had paid $28,100.00 for a 10-foot strip of the property in the condemnation proceedings, and Shell Oil Co. had offered $85,000.00 for the balance of this divided parcel. He knew of other sales in Los Angeles of similar properties.

It should be apparent from the evidence that a new loan can be obtained on the properties for a sufficient

amount to more than pay all secured indebtedness, and Mr. Baird's testimony shows that efforts are now being made to secure such a loan.

Under the facts of this case where Farmer Bros. Co. were estopped from foreclosing it was not necessary for the Court to keep open the question of the right of Farmer Bros. Co. to again apply for similar relief should an adverse change in the financial condition of Huddle Enterprises, Inc. so justify. It is always wise for the Court to do so, and since such relief is for the benefit and not to the detriment of Farmer Bros. Co., it is in no position to complain. If ever there came a time when the financial condition of Huddle Enterprises, Inc. was such that Farmer Bros. Co. should be permitted to foreclose to protect its secured interest, the debtor corporation could then waive the issue of estoppel.

This Honorable Court, in reviewing the Findings of Fact, Conclusions of Law and Order of the Referee, is governed by the General Order No. 47 of the Supreme Court, which provides:

> "Unless otherwise directed in the order of reference the report of a Referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Our courts have repeatedly held that the court must accept the Findings of the Referee unless clearly erroneous.

Washington v. Houston Lbr. Co., 310 F. 2d 881;
Simon v. Agar, 299 F. 2d 853;

Solomon v. Northwestern State Bank, 327 F. 2d 720;
In Re Berger Steel Co., 327 F. 2d 401;
In Re D.I.A. Sales Corp., 339 F. 2d 175.

Answer to Appellant's Brief Argument No. 1.

We have said before, and we repeat, that in the absence of consent or its equivalent such as estoppel a plan of arrangement only affects the rights of unsecured creditors. In the case here before the court, appellant was both a secured and unsecured creditor. It was more than that. As one of the principal creditors, it participated in the organization of the debtor corporation and at all times had one of its officers or employees upon debtor's board of directors who were responsible for the plan of arrangement after much discussion. Still more, it had a representative upon the creditors committee who participated in many meetings where the plan of arrangement was presented and discussed. Appellant even contributed money to cover costs of preparing a schedule for the plan, and never once did appellant's representative raise his voice against any of the provisions in the plan.

The importance of keeping the service station properties intact, and the bank's loan in good standing by the continued application of the service station rentals, and a reduction of the amount of the bank loan; and then to make a new loan on the service station properties so that junior lien creditors such as appellant could be paid and eventually dividends to the unsecured creditors, was discussed many times. From all appearances and statements of appellant's representative on the Board of Directors and the Creditors Committee, they were in hearty agreement.

If they were not, they never opened their mouth to the contrary. They said in effect that they had co-operated in the past and intended to in the future. Appellant said it would go along as it had in the past, and it had not even asked for payment of interest in the past. Why should they? As the second lien creditor on the service station properties, appellant would be the first to profit after the payment of the balance to the bank, and this would also benefit appellant by placing its unsecured claim in better standing and much closer to a payday or dividend.

Furthermore, it would no longer be possible for the taxing agencies to lay claim against Farmer Bros. Co., or its representative on the Board of Directors of debtor, for failure to pay certain taxes which had been collected by debtor in a trust capacity, such as withholding taxes.

A Director of a Corporation Is a Fiduciary.

We believe that the language of the Supreme Court cannot be overlooked in this case, wherein the Court said in *Pepper v. Litton*, 308 U.S. 295, 60 S. Ct. 238 at 245:

> "Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. *Twin-Lick Oil Company v. Marbury*, 91 U.S. 587, 588, 23 L.Ed. 328. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Company v. Bogert*, 250 U.S. 483, 492, 39 S.Ct. 533, 537, 63 L.Ed. 1099. Their powers are powers in trust. See *Jackson v. Ludeling*, 21 Wall. 616, 624, 22 L.Ed. 492. Their dealings with the corporation are subjected to rigorous scrutiny and

> where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes v. Anaconda Copper Mining Company,* 254 U.S. 590, 599, 41 S. Ct. 209, 212, 65 L.Ed. 425."

We believe, and we urge, that the director of the debtor who was placed there at the insistence of appellant, and who also served upon the creditors' committee, owed sufficient fidelity to debtor, the other directors and creditors to speak his mind and the feelings of appellant if appellant was unwilling to go along with the program discussed, and agreed upon, and formulated with the assistance of appellant, and more especially should have spoken his mind when he knew that certain creditors were advancing large sums of money to complete the plan and pay obligations which benefited appellant, and who obviously would not have done so had they not believed that appellant was going to abide with the program so often discussed.

The fact that the plan related how the bank's lien claim would be liquidated under an already executed agreement does not mean that the debtor was attempting to alter an existing agreement. It, in effect, was saying that it was going to comply with the existing agreement. Also, the fact that the plan relates that certain funds would be earmarked for the payment of interest on junior liens, was not made for the purpose of trying to bind any secured creditor who refused to go along with the contemplated plan, but rather to inform unsecured creditors what certain funds of debtor

would be used for. This, in effect, explains to unsecured creditors that such funds would not be available to them. The plan, as adopted, was as much the handiwork of appellant's representative on the Board and Committee, as it was of any other creditor.

Point II of Appellant's Brief.

Since we agree that the Court in a pending Chapter XI proceeding has the power of restraint in a proper case, we shall not spend further time upon this point.

Retention of the Service Station Properties Is Essential if Unsecured Creditors Are to Receive a Dividend.

The retention of the service station properties is vital to the successful conclusion of the plan of arrangement herein, for the following reasons:

First: These stations are located in valuable locations very acceptable to the Texaco Oil Company, and other big oil companies, as for that matter. We believe the evidence in this case, and particularly the testimony of Paul S. Cummins, shows this. A lease to a major oil company is about as sound security as one could have. The evidence shows that the returns from these leases are paying off the bank loan at a very satisfactory rate, and the security the bank holds is more valuable today by far than it was the day the bank's loan was made. Appellant's second lien is more secure, if for no other reason than by a reduction of almost one half million dollars on the bank's original loan.

Second: These service station properties are sound investments and good producers of revenue, and by retention of them, debtor believes it can secure a new loan to liquidate appellant's secured claim and other se-

cured claims, and have a substantial surplus to pay unsecured creditors. When the new loan is again reduced by rentals from the service stations and from advantageous sales of some of the properties, the debtor will then be getting into a position where it can do more for the unsecured creditors of which appellant is one.

So much cannot be said for the restaurant properties which are already heavily encumbered. The restaurant business is always vulnerable to bankruptcies, as is evidenced by the large claims here in evidence of coffee and dairy products. Certainly such creditors did not become such because of any credit for sales to the service stations. If it had not been for the restaurant business, Mr. Cummins and his property would not be involved in this Chapter proceeding.

We believe it is obvious that if unsecured creditors are benefited in this debtor proceeding, the benefit must come through the operation of the service stations and until they can be liquidated at a satisfactory price. Mr. Tongue of Arden Farms says this was foremost in the discussions of the plan. Without the service station properties, the Plan would be hopeless. All of these points were urged at the committee's discussion of the amended plan.

Effect of Stay Order, and Tender of Interest.

Appellant says it has received no interest. We do not believe appellant will dispute the fact that debtor tendered it a cashier's check for the interest due on the date of the hearing herein, and that it is still holding this check uncashed. The record shows that the tender was made.

Appellant is not injured. Its security position is constantly getting better with each monthly payment to the bank on the first lien, plus the constant increase in property values, and if it is in need of cash, there is nothing to prevent it from cashing the cashier's check which is in its possession.

Appellant is not injured where it has a valid agreement to be paid interest, the rate of which was fixed by it, for the use of its money, and where it has adequate security for the payment of the full debt.

Basis for Estoppel — Silence.

Appellant says that estoppel cannot be based upon silence, absent a duty to speak. If Appellant did not have a duty to speak under the facts of this case, then it is difficult to imagine a case which would require a plain duty to speak.

Appellant attempts to picture itself as a poor, downtrodden, secured and unsecured creditor who is being pushed around. It must be remembered, however, that Appellant here had its secured claim, and it was in existence before it, in conjunction with other creditors, decided upon an assignment for the benefit of creditors and it, along with these other creditors, was responsible for the creation of the debtor corporation for the very purpose of becoming an assignee in this case. Its selected representative was upon the Board of Directors of debtor, and subsequently upon the creditors committee, and it had as much to do with the formulation and approval of the amended plan of arrangement which was ultimately approved by the court as any other creditor who was upon debtor's Board of Directors, or upon the creditors committee.

It must also be remembered that this debtor corporation, operated by a board of directors of which a representative of Appellant was one, got the debtor corporation into financial difficulty—this is shown by the plan of arrangement itself, and we have here a representative of debtor making certain representations to unsecured creditors in this case through the plan of arrangement, which he was as much instrumental in creating as any other member on the board. Now that the plan which appellant's representative helped prepare and present to the Court has been approved, appellant says it is injured thereby.

Under the equitable theory of bankruptcy jurisprudence, and under the facts, unsecured creditors in this classification might very well be in a sound position to ask for subordination of the secured claim of Farmer Bros. Co. until unsecured claims of said creditors were paid.

See quotation hereinabove in *Verdugo Canyon Water Co. v. Verdugo,* 152 Cal. 655, and *Pepper v. Litton,* 308 U.S. 295, 60 S. Ct. 238 at 245.

Estoppel Based Upon Promises Concerning the Future.

Upon this point, Appellant cites and quotes from *The Bank of America v. Pacific Ready-Cut Homes,* 122 Cal. App. 554 at 562. It will not be overlooked that in this quotation, the court refers to it as the "general rule", but there are certain exceptions and determinations which are governed by the facts in the particular case.

19 Am. Jur. §53, page 657, states:

> "The broad rule stated in the preceding section to the effect that a promise to do or not to do

something in the future does not work an estoppel must be qualified, since there are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. The doctrine of 'promissory estoppel' is by no means new, although the name has been adopted only in comparatively recent years. According to that doctrine, an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice. Promissory estoppel is sometimes spoken of as a species of consideration or as a substitute for, or the equivalent of, consideration, but the basis of the doctrine is not so much one of contract with a substitute for consideration, as an application of the general principle of estoppel, since the estoppel may arise although the change of position of the promisee was not in any way an inducement to the promise and was not regarded by the parties as any consideration therefor.

The doctrine of promissory estoppel is most widely recognized and most frequently applied in cases of promises or representations as to an intended abandonment of existing rights. Some courts have even stated that these are the only cases in which promises as to the future may be the basis of an estoppel. The better-considered statements of the doctrine, however, do not contain this limitation, and the courts have actually applied the doctrine in numerous instances which could not fairly be said to involve an abandonment of an existing right."

In the case of *Calistoga National Bank v. Calistoga Vineyard Company,* 7 Cal. App. 2d 65 at page 71, the court said:

> "The court erred in sustaining objections to the effort on the part of the defendants to prove their affirmative defense of equitable estoppel. As a counterclaim they alleged they were entitled to a credit of $850 on the balance for which they had been sued on their promissory note. It was also alleged that the payment of the forged checks had been promptly called to the attention of the bank and that it waived the provisions of section 340, subdivision 3, of the Code of Civil Procedure, by then agreeing to credit on their note the sum of these forged checks *when the note was paid.* This pleading properly raised the issue regarding the alleged waiver of the statute of limitations, which the defendants were entitled to prove, if possible, as an offset to the balance of the note which the plaintiff claims was due." (Emphasis ours.)

In *Banning v. Kreiter,* 153 Cal. 33, it is said:

> "While, generally, a representation to raise an estoppel, where the negotiations have ended in a contract, must relate to an existing fact, and not be a mere expression of opinion or a promise of future performance, a well-recognized exception to the rule exists where the statement relates to an intended abandonment of an existing right and is made to influence others, and they have been influenced by it."

See also:

Wade v. Markwell & Co., 118 Cal. App. 2d 410.

In the case of *Banco Mercantil v. Sauls, Inc.,* 140 Cal. App. 2d 316, at page 323, the court said:

> "The first essential may be established either by proof of actual misrepresentation or by proof of careless and culpable conduct resulting in the deception of the party entitled to claim the estoppel."

In the case of *Parke v. Franciscus,* 194 Cal. 284, at page 297, it is said:

> "It is well settled that negligence, that is, careless and culpable conduct is as matter of law equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel."

In the case of *Safway Steel Products v. Lefever,* 117 Cal. App. 2d 489, at page 489, the court said:

> "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."

In the case of *Seymour v. Oelrichs,* 156 Cal. 782, at page 784, the court said:

> "A representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and acted upon by him, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity."

Whether the actions, conduct and statement of Appellant be called a promise, an agreement of forbearance, or a waiver of a right, or were made to influence the other parties, it nevertheless was estopped under the facts in this case in its attempt to upset the plan of arrangement, which it helped formulate and presented

to creditors, which it in conjunction with other director-creditors of the debtor corporation, created.

There was also a consideration running to Appellant by the payment of tax claims, which if not paid by the debtor, would have been a liability of Appellant's representative upon the board of directors of debtor, such as withholding taxes which accumulated during the operation by debtor.

Findings of Referee.

There has been an attack made upon certain Findings of the Referee. We do not believe it necessary to belabor this question, since there is evidence clearly supporting all of the Findings made by the Referee, and unless said Findings are clearly erroneous, this Court is bound thereby under General Order 47 of the Supreme Court.

Violation of Plan of Arrangement.

Appellant contends that Appellee has not abided by the plan of arrangement. We have heretofore mentioned in this brief that Appellant holds a check for interest paid it under the plan which it has failed to cash. Also, Mr. Baird testified with respect to his efforts with Appellant to come to an agreement upon the payment of the interest, and Mr. Baird also said that he asked Mr. St. John at the last meeting of the board of directors about rumors which he had heard, that Farmer Bros. Co. intended to endeavor to foreclose upon their secured indebtedness, and that Mr. St. John as late as July, 1964, long after the approval of the plan, stated that they did not intend to foreclose. Furthermore, may we repeat that Appellant approached this subject as

though it was not in reality a part of the debtor. Its representative upon the board of directors and upon the creditors committee had as much to say about the conduct of the debtor after the approval of the plan as any other member of the board of directors or officers of the debtor corporation.

In conclusion, may we say that the estoppel is not only applicable in favor of Arden Farms Co. and Carnation Company, but in favor of every other creditor who became such after the assignment for the benefit of creditors and after the Incorporation of the debtor. Many creditors had raised substantial sums of money to make possible the confirmation of the plan, which a representative of appellant helped formulate and voted for. They certainly would suffer a detriment where any proceeding was had which might endanger the repayment of their money or their claims.

We respectfully submit that the Judgment and Findings of the Referee and of the United States District Court should be sustained.

Respectfully submitted,

UTLEY & HOUCK,
By ERNEST R. UTLEY,
Counsel for Debtor.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ERNEST R. UTLEY